IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 272 of 2004

with

CRIMINAL MISC.APPLICATION No 8400 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHARATSINH PRATPSINH PARMAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 272 of 2004

MR IQBAL M MALIK for Appellant No.

MS HARSHA DEVANI, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 21/09/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

1. Present Criminal Misc. Application is filed under Section 389 of the Code of Criminal Procedure by the original accused Bharatsinh Pratapsinh Parmar who has been convicted by the Additional Sessions Judge, Fast Track Court No. 1, Bhavnagar for committing offence under section 302 of the Indian Penal Code [IPC] and he has been sentenced to suffer rigorous imprisonment [RI] for life vide judgment and order dated 29th December, 2003 passed in Sessions Case No. 50 of 1995. Original accused nos. 2 and 3 have been convicted for offences under section 324 read with section 114 of the IPC as well as section 135 of the Bombay Police Act, but they have been granted benefit under the Probation of Offenders Act.

2. The incident in question had taken place on 16th November, 1994 at about 7.30 p.m. in the city of Bhavnagar. It was alleged by the prosecution that the present appellant alongwith original accused assaulted the deceased and others with deadly weapons like axe, crowbar fitted in the pipe and piece of wood. As a result of assault, complainant's son Ajay had received serious injuries and ultimately died due to them. In view of the incident, the FIR was lodged and the police carried out the investigation and on completion of the same, submitted charge-sheet in the Court of the Ld. Magistrate, Bhavnagar, who in turn committed the case to the Court of Sessions since offence under section 302 is exclusively triable by the Court of Sessions.

2.1. At the trial, the prosecution examined witnesses as well as produced documentary evidence. The defence of the accused appeared to be that of general denial. At the end of the trial, learned Judge convicted the appellant for offence under section 302 of the IPC and section 125 of the Bombay Police Act, etc. as stated above and sentenced him to suffer RI for life, which is under challenge in this appeal.

2.2. While hearing the application for suspension of the sentence and bail, we have called for the record and proceedings of the case. On going through the same, prima-facie we were of the opinion that the conviction recorded under section 302 of the IPC was erroneous. Hence, at the request of the learned

advocates for the parties, we have taken up the matter for final hearing today itself.

3. On going through the evidence on record as well as the judgment of the trial Court and after hearing Mr. IM Malik, learned advocate for the appellant and Miss Harsha Devani, Ld. APP for the respondent State, we have given our careful consideration to the entire case. So far the involvement of the appellant in the incident is concerned, Mr. Malik has fairly conceded that it is duly proved by the prosecution. In his submission, even if the facts are taken to be true, the offence would not be covered under section 302 of the IPC. As against that, Miss Devani, Ld. APP has submitted that there is no error in the judgment of the trial Court and the conviction is required to be maintained.

3.1. Since Mr. Malik has conceded the involvement of the appellant in the incident, it has made our task little easy. However, we have also verified the role of the appellant by perusing the evidence of the eye witnesses who are injured in the incident. From the evidence of those witnesses, it clearly appears that the appellant on that day was duly armed with axe and he alongwith others arrived there with a view to assault members of the prosecution side. He had given blow with the reverse side of the axe on the stomach of the deceased. The complainant Bhagvatiben Shantilal Exh. 53, P.W. Dhaniben Madhabhai Exh. 55 and P.W. Gitaben Bachubhai Exh. 56 are the witnesses who were present alongwith others and had received injuries. There is nothing on record to disbelieve their evidence. In view thereof, we can safely hold that the appellant was responsible for causing injuries to the deceased and others.

4. The question that would remain to be answered is whether the conviction recorded by the trial Court under section 302 of the IPC is proper. Keeping this issue in view we have carefully perused the medical evidence to determine it. The post mortem notes and the oral evidence of Dr. Harun Sulemanbhai Parmar, who has performed the autopsy of the body of deceased Ajay are relevant for this purpose. According to this witness, the death was caused due to rupture of the spleen. He has, however, stated that there is no external mark of injury on the stomach region of the deceased. In his evidence he has admitted that since the spleen was ruptured, he could not take the measurement of the spleen. He has further admitted that even he had not

measured the weight of the spleen. The post mortem notes are produced at Exh. 26. On perusing column no. 17 thereof, it specifically says that there were no external injuries on the body. So far column no. 20 is concerned, it reflects that the spleen was ruptured in irregular margin. The Medical Officer has opined that the death was caused due to shock resulting from the injury to vital organ and haemorrhage.

5. From the aforesaid medical evidence it is to be seen first whether the appellant intended to cause death of Ajay or whether he intended to cause such injury which could be sufficient in ordinary course of nature to cause death. To gather the intention of the assailants, it is necessary to understand the nature of the weapon, the manner in which the injury is caused and the part of the body to which the injury is caused. When the appellant is armed with weapon like axe and if he intended to cause the death, he would have chosen to inflict injury on the vital part of the body such as head or neck and that too with sharp edge of the axe. It is a matter of common knowledge that these are the parts of the body normally chosen by the assailants for inflicting blows when weapon like axe is used for assault. Nodoubt the stomach is also vital part of the body, but when there is no external mark of injury on the stomach and when the axe is not used in the manner in which it is normally used, it would reflect that the appellant did not entertain any intention to cause death of the person. Whatever blow that had been given on the stomach was with the blunt portion of the axe. Unfortunately that has resulted into rupture of the spleen. The Medical Officer has admitted that he had neither measured the size of the spleen nor had he taken the weight of the spleen, which could have thrown light whether it was enlarged. That benefit would certainly go to the appellant. Therefore, it is easy to infer that the appellant did not entertain any intention to cause death or cause such bodily injury which could be sufficient in the ordinary course of nature to cause death. The act of the appellant, therefore, does not fall within the ambit of clauses 1 and 3 of section 300. The medical evidence does not throw any light whether there would not be any external mark of injury even when the blow was given with force. Further prosecution has not proved that the victim had diseased spleen and the appellant was knowing this fact. Hence, case will not fall under clause 2 of section 300 of IPC also. Thus, the case does not fall under any of the first three clauses of section 300 of IPC. Clause fourthly is out of question. Hence there is no culpable homicide amounting to murder. In our view, the finding

of the trial Court regarding appellant committing offence punishable under section 302 is erroneous and it is required to be quashed and set aside. So far the intention to cause injury which is likely to cause death or even knowledge on the part of the appellant that if he inflicted such injury it may result into victim's death is concerned, that also does not appear to be there because the autopsy report shows that not even slightest mark of external injury was there on the stomach; meaning thereby whether great force was used while inflicting the blow is doubtful. Admittedly blunt side of the weapon is used. The offence, therefore, does not fall either under section 304 Part-I or Part-II of the IPC.

5.1. We, however, are of the opinion that having regard to the fact that the axe which is a dangerous weapon and the injury was caused on the stomach region, it would amount to causing such injury so as to endanger the life of a person. Unfortunately, as a matter of fact, it has resulted into the death of the victim. Thus the act of the appellant would stand covered under the clause 8 of section 320 of the IPC which is punishable under section 326 of the IPC being grievous hurt with dangerous weapon. Since the person has died, we are required to take strict view of the matter while imposing the sentence. In our opinion, the bereaved mother is also required to be given token compensation by imposing heavy fine.

5.2. Since we have held that there is no offence committed under section 302, the conviction under that Section and the order imposing sentence of life imprisonment are quashed and set aside. Instead we now hold the appellant guilty of committing offence under section 326 of the IPC, consequently he is sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.10,000/= [Rupees Ten Thousand only], in default further RI for one year. We also direct that if the fine is paid, Rs.9,000/= is to be paid to the complainant Bhagvatiben Shantilal by the trial Court after due verification. So far the other offences are concerned, the conviction and order of sentence are confirmed. All the Sentences are directed to run concurrently.

In the result, the appeal is partly allowed.

6. In view of the above, no order is required to be passed in Criminal Misc. Application No. 8400 of 2004. Hence it is disposed of accordingly.

Notice discharged.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.